



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 8  
999 18<sup>TH</sup> STREET - SUITE 300  
DENVER, CO 80202-2466  
Phone 800-227-8917  
<http://www.epa.gov/region08>

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

APR 28 2005

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Ref: 8ENF-W

Brown County Fair Board  
Tammy Dennert, President  
25 Market Street  
Aberdeen, SD 57401

Brown County Commission  
Dennis Feickert, Chairman  
25 Market Street  
Aberdeen, SD 57401

Re: Findings of Violation and  
Administrative Order for Compliance  
Docket No. CWA-08-2005-0017

Dear Ms. Dennert and Mr. Feickert:

Based on our review of all available information, the United States Environmental Protection Agency (EPA) has determined that the Brown County Fair Board and Brown County, a political subdivision of the State of South Dakota, are in violation of the Clean Water Act, as amended (CWA). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 CFR § 328.3.

Specifically, the Brown County Fair Board and Brown County have discharged dredged or fill material into waters of the United States without authorization under the CWA. These discharges of pollutants to an unnamed wetland that is part of a continual tributary system that enters Moccasin Creek, which enters the James River, has occurred at the Brown County Fairgrounds at a site located in the southeast quarter of the southwest quarter of section 1, Township 123 North, Range 64 West, Brown County, South Dakota.



Enclosed is an EPA Region 8 administrative order which specifies the nature of the violations and describes actions necessary in order for the Brown County Fair Board and Brown County to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). The order requires the Brown County Fair Board and Brown County to inform EPA in writing, within five days of receipt, of their intent to fully comply with the order.

The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this order does not preclude civil or criminal actions in the U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

Please review the order carefully. If you have any questions, the most knowledgeable people on my staff are Sheldon Muller, Enforcement Attorney, at 303-312-6916 and Monica Heimdal, Enforcement Officer, at 303-312-6359.

Sincerely,



Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice

Enclosure (Findings of Violation and Order for Compliance)

cc: Tina Artemis, EPA, Regional Hearing Clerk  
David L. Lagrone, U.S. Army Corps of Engineers  
John Miller, South Dakota Department of Environment and Natural Resources  
Steven Naylor, U.S. Army Corps of Engineers

2005 APR 28 AM 11:10  
**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8**

2005 APR 28 AM 11:10  
FILED  
EPA REGION VIII  
HEARING CLERK  
**IN THE MATTER OF:**

**Brown County Fair Board and  
Brown County, a Political Subdivision of  
the State of South Dakota  
25 Market Street  
Aberdeen, SD 57401  
  
Respondents.**

**FINDINGS OF VIOLATION AND  
ADMINISTRATIVE ORDER FOR  
COMPLIANCE**

Docket No. CWA-08-2005-0017

**I. STATUTORY AUTHORITY**

This Findings of Violation and Administrative Order for Compliance ("Order") is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency ("EPA") by section 309 of the Clean Water Act ("CWA"), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the findings of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

**II. FINDINGS OF VIOLATION**

1. Respondent Brown County Fair Board is an entity created by the Brown County Board of Commissioners pursuant to South Dakota statutory authority. Respondent Brown County is a political subdivision of the State of South Dakota. The Brown County Highway

Department is a department of Brown County. Respondents' primary offices are located at 25 Market Street, Aberdeen, South Dakota.

2. At all relevant times, Respondents owned, controlled, managed, and/or operated Brown County Fairgrounds property containing an unnamed wetland located in the southeast quarter of the southwest quarter of section 1, Township 123 North, Range 64 West, Brown County, South Dakota.

3. The unnamed wetland is part of a continuous tributary system that enters Moccasin Creek, which enters the James River. The James River is, and was at all relevant times, a navigable, interstate water.

4. On May 13, 2002, the U.S. Army Corps of Engineers' ("Corps") South Dakota Regulatory Office received a written request from the Brown County Fairgrounds manager for "a permit to fill in two low land areas on the southeast corner of the fairgrounds and the area just east of the racetrack . . . to take care of the overflow parking during the fair . . . and reclaim it for use at the fairgrounds." In response, the Corps conducted a site visit on May 17, 2002, and confirmed the presence of jurisdictional wetlands. On May 20, 2002, the Corps sent a letter to the attention of the Brown County Fairgrounds manager explaining the basis for the Corps' determination that two of three identified wetland areas were jurisdictional and would require a permit from the Corps for the proposed project. The Corps included a packet containing a wetland map identifying the jurisdictional and non-jurisdictional wetlands, an application for a permit, and an information pamphlet.

5. On May 14, 2004, the Corps received a permit application from the Brown County Fairgrounds requesting authorization to fill 185,220 square feet of jurisdictional

wetlands, of which, according to the application, 100,800 square feet already had been filled with clay and a portion of that then covered with black dirt. In response, on May 26, 2004, the Corps conducted a site inspection and performed a wetland delineation. The Corps found, and EPA through issuance of this Order finds, that Respondents and/or their agents discharged fill material consisting of waste asphalt, clay, and gravel into at least 0.882 acre of waters of the United States without authorization beginning on or about March 12, 2004, and ending on or about April 22, 2004.

6. By letter dated September 2, 2004, directed to the manager of the Brown County Fairgrounds, the Corps found, and EPA through issuance of this Order finds, that Respondents' actions, as described in paragraph 5 of Section II of this Order, required prior Corps authorization and that the required authorization had not been granted. Also, the Corps directed Respondents to "cease and desist" any further unauthorized work at the site and requested a detailed explanation of why work was performed "prior to receiving authorization." The Brown County Fairgrounds manager responded to the Corps' cease and desist order, stating that inexpensive fill was available from the Brown County Highway Department and some of it was brought in before the permit application was submitted to the Corps.

7. The Brown County Highway Department was directly involved in the activities described in paragraph 5 of Section II of this Order. One or more of its employees and/or agents surveyed the site to quantify the amount of material necessary to fill the unnamed wetland, and then provided and delivered waste asphalt, clay, and gravel and discharged it to the unnamed wetland.

8. Brown County is aware of the basic permit requirements associated with the CWA section 404 regulations. Brown County has applied for and received several CWA section 404 permits in the past.

9. The activities described in paragraph 5 of Section II of this Order were performed using common earthmoving vehicles and equipment, including trucks and a grader, which were operated by Respondents and/or by one or more individuals on behalf of Respondents.

10. The unnamed wetland filled and disturbed by Respondents' unauthorized activities provided various functions and values including water quality benefits as a result of sediment runoff retention, nutrient removal, and transformation; flood flow attenuation; wildlife habitat; wildlife viewing; and aesthetics.

11. Respondents are each a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. The discharged waste asphalt, clay, and gravel referenced in paragraph 5 of Section II of this Order is and was at all relevant times "fill material" within the meaning of 33 C.F.R. § 323.2(e) and a "pollutant" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

13. The vehicles and equipment described in paragraph 9 of Section II of this Order are and were at all relevant times each a "point source" within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

14. The unnamed wetland referenced in paragraphs 2 and 3 of Section II of this Order is and was at all relevant times a "water of the United States" within the meaning of 33 C.F.R.

§ 328.3(a) and therefore a “navigable water” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

15. The placement of fill material into the unnamed wetland constitutes the “discharge of pollutants” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

16. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of pollutants by any person into waters of the United States except as in compliance with section 404 of the CWA, 33 U.S.C. § 1344.

17. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.

18. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

19. Respondents are not and never have been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to conduct any of the activities described in paragraph 5 of Section II of this Order.

20. The activities conducted by Respondents and/or their agents as described in paragraph 5 of Section II of this Order violate section 301 of the CWA, 33 U.S.C. § 1311. Each discharge of pollutants from a point source by Respondents into waters of the United States without the required permits issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the

discharges remain in place without the required permits constitutes an additional day of violation of section 301(a).

21. The removal of the fill material illegally discharged into waters of the United States at Respondents' property and restoration of the impacted wetland to a condition that closely approximates its condition and function prior to the discharge of the fill material, can be achieved as a practical matter through commonly used methods of construction, digging, revegetation, and best management practices.

22. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the CWA's objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," as specified in section 101(a) of the CWA, 33 U.S.C. § 1251(a). The removal and restoration described in paragraph 21 of Section II of this Order are appropriate to alleviate actual and potential harm to water quality, aquatic habitat, and wildlife habitat caused by Respondents' unauthorized activities.

23. This Order was issued after consultation and coordination with the Corps' Omaha District.

### **III. ORDER**

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the authority vested in the Administrator of EPA pursuant to sections 308 and 309(a) of the CWA, 33 U.S.C. §§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED:

1. Respondents shall immediately terminate all unauthorized discharges of dredged or fill material, now and in the future, into waters of the United States, unless specifically



authorized by the Corps under a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.

2. Within five (5) calendar days of receipt of this Order, Respondents shall inform EPA in writing of Respondents' intent to fully comply with the Order. EPA requests that Respondents meet with EPA within fourteen (14) calendar days of issuance of this Order if there are concerns or questions about the requirements of the Order. The scheduling of such a meeting shall not alter Respondents' responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondents by EPA.

3. Upon EPA approval of the restoration plan required by paragraph 6 of Section III of this Order, Respondents shall remove all fill materials that were discharged as a result of the violations identified in this Order and restore the unnamed wetland and any other impacted areas to their pre-impact condition and grade, unless otherwise approved by EPA in the restoration plan.

4. All fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in wetland restoration. The consultant also shall directly supervise all work performed pursuant to the EPA-approved restoration plan. A statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

5. All fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in wetland restoration. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

6. Within forty-five (45) calendar days of receipt of this Order, Respondents shall submit to EPA for review and comment a restoration plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the discharged fill material from the unnamed wetland and restoring the unnamed wetland and any other impacted areas to their pre-impact condition and grade.

7. The restoration plan shall be prepared in accordance with "U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans," attached hereto as Exhibit A. In addition, the restoration plan shall include:

- a. A detailed work plan and schedule for all of the work to be accomplished, as specified in the restoration plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than sixty (60) days after EPA approves the restoration plan;
- b. Locations of the existing natural features and man-made improvements, including all surface disturbance, fills, channel excavations, road crossings, culverts, structures, and any other work, including a corresponding map (scale 1":100') of these locations;

- c. Grading, planting, and monitoring plans, measurable criteria for success of restoration, and provisions for proper disposal of any excess soils or other materials generated during removal and restoration;
- d. Detailed professional drawings of all of the work to be accomplished, as specified in the restoration plan, including plan and profile drawings with control elevations; and
- e. A description of all costs necessary to complete the work to be accomplished by the restoration plan, including the costs of consultations, permits, monitoring, and construction.

8. EPA will review the restoration plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the restoration plan, Respondents shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

9. Upon receiving EPA's written approval of the restoration plan, Respondents shall obtain all necessary permits to implement the EPA-approved plan and then commence all restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondents shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

10. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order

requires a permit from the Corps under section 404 of the CWA. If required, Respondents shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 9 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers  
South Dakota Regulatory Office  
28563 Powerhouse Road, Room 118  
Pierre, SD 57501  
Telephone: 605-224-8531  
Facsimile: 605-224-5945

11. Respondents shall submit two (2) copies of the restoration plan, all notifications, and related correspondence to:

Monica Heimdal, 8ENF-W  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6359  
Facsimile: 303-312-6409

A copy of the restoration plan, all notifications, and related correspondence shall also be provided to:

Sheldon H. Muller, 8ENF-L  
U.S. Environmental Protection Agency, Region 8  
999 18th Street, Suite 300  
Denver, CO 80202-2466  
Telephone: 303-312-6916  
Facsimile: 303-312-6953

A copy of the restoration plan shall also be provided to the Corps at the address noted in paragraph 10 of Section III of this Order.

12. In addition to the notification requirement set forth in paragraph 11 of Section III of this Order, after issuance of any Corps authorization for restoration work, Respondents shall

submit all notifications and correspondence to the Corps in accordance with the terms and conditions in the Corps permit.

13. Any deliverables, plans, reports, specifications, schedules, and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules, and attachments shall be deemed a failure to comply with this Order and subject to EPA enforcement.

14. Respondents shall allow, or use their best efforts to allow, access by any authorized representatives of EPA or its contractors, the Corps, the Natural Resources Conservation Service, the U.S. Fish and Wildlife Service, the South Dakota Department of Game, Fish, and Parks, and the South Dakota Department of Environment and Natural Resources, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by this Order;
- b. To inspect and monitor compliance with this Order; and
- c. To verify and evaluate data and other information submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

15. Respondents' obligations under this Order are joint and several. This Order shall be effective upon receipt by Respondents.

16. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation which occurred on or before March 15, 2004, and \$32,500 per day for each violation thereafter, of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a), including this Order. Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.

17. Compliance with the terms and conditions of the Order shall not be construed to relieve Respondents of their obligation to comply with any applicable Federal, state, or local law or regulation. Failure by Respondents to complete the tasks described herein in the manner and time frame specified pursuant to this Order may subject Respondents to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

CWA-08-2005-0017

DATED this 27<sup>th</sup> day of April, 2005.

A handwritten signature in cursive script, appearing to read "Carol Rushin", is written over a horizontal line.

Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice